

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Applications

of

PEERLESS WEIGHING AND  
VENDING MACHINE CORPORATION

for revision or refund of franchise  
taxes under Article 9-A of the tax  
law for 1962 and 1963.  
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Peerless Weighing and Vending Machine Corporation  
having filed applications for revision or refund of franchise  
taxes under Article 9-A of the tax law for 1962 and 1963, and  
a hearing having been held in connection therewith at the office  
of the State Tax Commission at 80 Centre Street, New York City,  
on June 11, 1971 before John J. Genevich, Hearing Officer of the  
Department of Taxation and Finance, at which hearing the tax-  
payer was represented by H. A. Bernbach, president of the corpor-  
ation, and the record having been duly examined and considered  
by the State Tax Commission,

It is hereby found:

(1) The taxpayer was incorporated in Delaware on  
October 16, 1935 and began business in New York on July 9, 1936.

(2) Based on final federal determinations submitted,  
assessments were issued on November 18, 1966 computed as follows:

	<u>1962</u>	<u>1963</u>
Entire net income as originally reported	\$ 30,123.72	\$14,455.77
Plus federal changes	681,076.80	74,829.97
Adjusted entire net income	711,200.52	89,285.74
Business allocation as reported	14.47%	16.48%
Base	102,910.71	14,714.29
Tax at 5½%	5,660.09	809.28
Original tax	369.68	325.71
Added tax	5,290.41	483.57

Included in the federal changes were the following items:

1962

Capital Gain - Amount awarded by the City  
of Chicago for condemnation  
of property \$547,799.94

Capital Gain	- Abatement of one-half year real estate taxes by City of Chicago	84,004.56
Capital Gain	- Net Income from operation of condemned parking lot from 7/25/62 to 12/31/62	<u>52,071.12</u>
	Total	\$ <u>683,875.62</u>

1963

Capital Gain	- Net Income from operation of parking lot from 1/1/63 to 1/31/63	\$ 8,648.57
Ordinary In- come	- Net Income from operation of parking lot from 2/1/63 to 7/7/63, under month to month agreement, deemed to be ordinary income	<u>51,786.66</u>
	Total	\$ <u>60,435.23</u>

(3) Timely applications for revision or refund were filed by the taxpayer claiming that the above federal items arose out of the gain on condemnation of property located in Chicago, and should be excluded from entire net income for purposes of computing the New York franchise tax.

(4) The taxpayer owns and operates parking lots and garages. It also owns industrial and office buildings from which rental income is received. During the years at issue, 1962 and 1963, its activity in New York consisted of the operation of a parking lot located in Long Island City with rental income being received from two small industrial buildings contiguous to the parking lot. In Chicago it operated eight or nine parking lots and garages and received rental income from industrial and office properties.

(5) Errors were made by the taxpayer in computing the capitalized value of rented property in Chicago for purpose of the property factor. The taxpayer used \$642,347.92 for 1962 and \$995,900.92 for 1963 whereas the correct values were \$889,093.28 and \$1,102,708.56, respectively.

(6) Separate books of account are maintained for the Chicago and New York operations. There is a tie in between the Chicago and New York offices in the areas of overall executive management, common insurance policies for garage keeper liability, public liability and workmens compensation and, at times, temporary small advances of funds.

(7) The taxpayer has consistently, throughout the years, reported the same income on New York franchise tax returns as reported for federal purposes, and has used the three-factor business allocation formula called for in the statute. In 1961 the taxpayer realized a capital gain of \$84,234.07 on the sale of real property located in New York and used the three-factor statutory formula in computing the New York tax.

(8) The taxpayer has consistently, throughout the years, deducted depreciation, real estate taxes and other expenses attributable to the condemned property in arriving at entire net income, and included the property, receipts and wages pertaining thereto in the business allocation formula.

(9) The taxpayer did not incur any franchise tax liability to the state of Illinois by reason of the gain derived from the condemned property since the Illinois tax is not based on income.

(10) Section 208.9 of Article 9-A of the tax law provides, in part:

"The term 'entire net income' means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, \* \* \* except as hereinafter provided, and subject to any modification required \* \* \*."

None of the exceptions or modifications in Section 208.9 provide for the exclusion of capital gains.

(11) Section 210.8 of Article 9-A of the tax law provides, in part:

"If it shall appear to the tax commission that any business or investment allocation percentage determined as hereinabove provided does not properly reflect the activity, business, income or capital of a taxpayer within the state, the tax commission shall be authorized in its discretion, in the case of a business allocation percentage, to adjust it by (a) excluding one or more of the factors therein, (b) including one or more other factors, \* \* \*, (c) excluding one or more assets, \* \* \*, or (d) any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state, \* \* \*."

The State Tax Commission hereby

**DETERMINES:**

(A) Since the gain on the condemned property was not taxed in its entirety under the franchise tax laws of Illinois, and in fact the gain had no effect at all on its Illinois tax liability, there is no inequity in requiring its inclusion in entire net income as called for by Section 208.9 and applying the three-factor statutory formula as modified below.

(B) The errors in capitalized rent as indicated at (5) above are corrected for 1962 and 1963, and in order to produce an equitable result pursuant to Section 210.8, the denominator of the property factor for 1962 is adjusted to reflect \$2,275,000 (representing 7/12 of the condemnation price of \$3,900,000 for the 7 months held) in lieu of the average cost of \$1,653,559.88 used by the taxpayer. The denominator of the receipts factor for 1962 is increased by \$631,804.50 to reflect the portion of the capital gain which had not been included by the taxpayer. No adjustment of the receipts factor


is required for 1963 because the capital gain of \$8,648.57 and ordinary income of \$51,786.66 from operation of the condemned parking lot were included by the taxpayer. The resettled taxes are:

	<u>1962</u>	<u>1963</u>
Entire net income	\$711,200.52	\$89,285.74
Business allocation as adjusted	11.4797%	16.313%
Allocated base	81,643.69	14,565.18
Resettled tax at 5½%	\$ 4,490.40	\$ 801.08

Dated: Albany, New York

this 22nd day of October 1971.

STATE TAX COMMISSION

  
\_\_\_\_\_  
President

  
\_\_\_\_\_  
Commissioner

  
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Commissioner